No. 91-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MOBIL OIL CORPORATION, THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, and REX ADAMS,
Petitioners,

v.

GERALD W. CHRISTOPHER, CHARLES L. PRUNTY, and BILLY G. TURNER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS	1
REASONS FOR GRANTING THE WRIT	2
I. BY UPSETTING ERISA'S CAREFULLY CRAFTED BALANCE BETWEEN BENEFIT PROTECTION AND BENEFIT PLAN COSTS, THE FIFTH CIRCUIT'S DECISION THREATENS THE EXISTENCE OF VOLUNTARY EARLY RETIREMENT PROGRAMS	3
A. Voluntary Early Retirement Programs Are a Recognized, Valuable Option for Employers and Employees That Is Threatened by the Fifth Circuit's Decision	3
B. The Limitation of Standing to "Participants" Implements Congress' Purpose to Protect Employees' Benefits, Without Imposing Excessive Costs on Employers Offering Voluntary Early Retirement Programs	7
II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CONSTRUCTION OF ERISA'S DEFINITION OF "PARTICIPANT"	10
A. The Definition of "Participant" as Construed in *Firestone* Is Applicable to All Causes of Action under ERISA Title I	10
B. The Construction of "Participant" Adopted by the Fifth Circuit Was Expressly Rejected in *Firestone*	13
C. This Court's Decision in *Ingersoll-Rand Co. v. McClendon* Is Consistent with *Firestone*	14
D. Plaintiffs Are Not Participants Under ERISA and *Firestone*	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932) 12
Baeten v. Van Ess, 474 F. Supp. 1324 (E.D. Wis. 1979) 17
Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164 (11th Cir. 1988) 7
Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134 (3d Cir. 1987), *modified*, 489 U.S. 101 (1989) 12
Carpenter v. Trans World Airlines, Inc., 1991 U.S. Dist. LEXIS 1293 (N.D. Ill. 1991) 5, 6, 17
Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir. 1992) 2
Conley v. Gibson, 355 U.S. 41 (1957) 15
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) ..... *passim*
Fischer v. Philadelphia Elec. Co., 1991 U.S. Dist. LEXIS 3076 (E.D. Pa. 1991) 5
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 15
Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990) 16
Helvering v. Stockholms Enskilda Bank, 293 U.S. 84 (1934) 12
Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990) 14-15
Jones v. AT&T Co., 1992 U.S. Dist. LEXIS 4139 (E.D. Pa. 1992) 14
Kuntz v. *Reese*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986) 17
Lee v. E.I. Du Pont de Nemours and Co., 894 F.2d 755 (5th Cir. 1990) 15-16
Lister v. Stark, 890 F.2d 941 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 579 (1990) 16
Martin v. General Motors Corp., 753 F. Supp. 1347 (E.D. Mich. 1991) 5
Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 7, 8, 16

TABLE OF AUTHORITIES—Continued

Page

Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990) 14, 16
Patterson v. Shumate, No. 91-913 (U.S. June 15, 1992) 12
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 7, 8, 15
Saporito v. Combustion Eng'g, Inc., 843 F.2d 666 (3d Cir. 1988), *vacated*, 489 U.S. 1049 (1989) .. 5
Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) 7
Shawley v. Bethlehem Steel Corp., 784 F. Supp. 1200 (W.D. Pa. 1992) 14, 17
Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989) 16-17
Sorenson v. Secretary of the Treasury, 475 U.S. 851 (1986) 12
Stanton v. Gulf Oil Corp., 792 F.2d 432 (4th Cir. 1986) 5, 6
Teagardener v. Republic-Franklin Inc. Pension Plan, 909 F.2d 947 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 678 (1991) 14
Warth v. Seldin, 422 U.S. 490 (1975) 15
Winchester v. Pension Comm. of Michael Reese Health Plan, Inc. Pension Plan, 942 F.2d 1190 (7th Cir. 1991) 14, 17
Zydel v. Dresser Indus., Inc., 764 F. Supp. 277 (W.D.N.Y. 1991) 17

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 17
Employee Retirement Income Security Act of 1974 ("ERISA") § 2, 29 U.S.C. § 1001 7
ERISA § 3, 29 U.S.C. § 1002 ..... 2, 8, 10, 11, 12-13
ERISA § 104(b), 29 U.S.C. § 1024(b) 12
ERISA § 502, 29 U.S.C. § 1132 ..... 8, 9, 10, 11, 12
ERISA § 510, 29 U.S.C. § 1140 ..... 3, 9, 10, 13, 15
ERISA § 514, 29 U.S.C. § 1144 14
ERISA Title IV, 29 U.S.C. §§ 1301-1461 10-11

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
S. 1511 Final Substitute: Statement of Managers, 136 Cong. Rec. S13,594 (1990)	4, 5, 6
H.R. Rep. No. 533, 93d Cong., 2d Sess. (1974)	7-8
H.R. Rep. No. 779, 93d Cong., 2d Sess. (1974)	9-10
H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974)	7
The Older Workers Benefit Protection Act, H.R. Rep. No. 664, 101st Cong., 2d Sess. (1990)	4, 5, 6
MISCELLANEOUS	
29 C.F.R. § 2510.3	17
Nondiscrimination Requirements for Qualified Plans, 56 Fed. Reg. 47,524 (Sept. 19, 1991)	4
19 Pens. Rep. (BNA) 429 (Mar. 9, 1992)	4, 5
19 Pens. Rep. (BNA) 490 (Mar. 23, 1992)	4
19 Pens. Rep. (BNA) 684 (Apr. 20, 1992)	4
19 Pens. Rep. (BNA) 787 (May 4, 1992)	4
Rev. Proc. 92-42, 1992-22 I.R.B. 41	4
Towers, Perrin, Forster & Crosby, *TPF&C Survey of Window Plans* (Apr. 1990)	4, 5-6

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BRIEF OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

The Association of Private Pension and Welfare Plans ("APPWP") is a nonprofit organization founded in 1967 to protect and foster the growth of this country's private employer-sponsored employee benefits system. The over four hundred members of the APPWP include both large and small employers that sponsor benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and also include plan support organizations such as investment firms, banks, insurers, actuarial firms and consulting firms, and benefits professionals. Collectively, the APPWP's members have sub-

stantial experience in retirement benefit plans of all types, including voluntary early retirement programs.

The APPWP has received consent to file this brief from both Petitioners and Respondents. Their letters of consent have been lodged with the Clerk of this Court.

REASONS FOR GRANTING THE WRIT

In this case, the Fifth Circuit effectively rejected this Court's common sense construction of the term "participant" under § 3(7) of ERISA, 29 U.S.C. § 1002(7),[1] in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In its place, the Fifth Circuit adopted a greatly expanded definition of "participant" that would expose ERISA plans and employers to substantially increased litigation by former employees who are not participants under ERISA § 3(7), as that term has been interpreted by this Court in *Firestone*.[2]

Not only does the Fifth Circuit's construction of this term greatly expand ERISA's definition of participant, it threatens the viability of all voluntary early retirement programs. If allowed to stand, the Fifth Circuit's ruling will grant standing to sue under ERISA to virtually every former employee who elects to retire and receive enhanced benefits under a retirement plan, rather than remain employed with the possibility of receiving lesser

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[1] ERISA § 3(7) provides that:

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

[2] The Fifth Circuit appears to concede that plaintiffs do not have standing under *Firestone*. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992), *reprinted in* Appendix to the Petition for Writ of Certiorari, at 21a-22a [hereinafter "Pet. App."].

benefits. All such a former employee need do under the Fifth Circuit's test of standing is claim that he "would be" an ERISA participant "but for" an alleged constructive discharge under ERISA § 510, 29 U.S.C. § 1140. Pet. App. 22a-23a, 26a.[3] At a time when many employers are being forced to reduce their workforces, this result undercuts the ability of employers to offer voluntary early retirement programs to current participants as a valuable alternative to lay-off or termination. Moreover, this result seriously undermines the balance struck by Congress in ERISA, by imposing substantial and unpredictable litigation costs on plans and employers, and thereby adversely affecting current participants, while at the same time providing no additional protection for individuals who have already received their full plan benefits.

I. BY UPSETTING ERISA'S CAREFULLY CRAFTED BALANCE BETWEEN BENEFIT PROTECTION AND BENEFIT PLAN COSTS, THE FIFTH CIRCUIT'S DECISION THREATENS THE EXISTENCE OF VOLUNTARY EARLY RETIREMENT PROGRAMS

A. Voluntary Early Retirement Programs Are a Recognized, Valuable Option for Employers and Employees That Is Threatened by the Fifth Circuit's Decision.

This case involves an amendment to Mobil's Retirement Plan, which had the effect of restricting the availability of the plan's lump sum distribution option. Mobil announced the amendment in advance of its effective date to provide eligible employees a six-month window period

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[3] Among other things, ERISA § 510 makes it unlawful "to discharge . . . a participant . . . for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title [I of ERISA, 29 U.S.C. §§ 1001-1168], section 3001 [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act."

within which to elect to retire with enhanced pension benefits under the terms of the plan as in effect prior to the amendment. Although the precise circumstances of this case were somewhat unusual, the effect of the amendment on eligible employees was not.

Every year, numerous employers adopt early retirement incentive programs that permit employees to retire earlier than they had planned, with retirement benefits more attractive than those to which they would otherwise be entitled.[4] Such early retirement incentive programs, referred to as "window" plans because they are limited in time, are entirely lawful. Indeed, both their validity and their importance has been recognized recently by Congress and the Internal Revenue Service. *See* H.R. Rep. No. 664 at 43-45; S. 1511 Final Substitute: Statement of Managers, 136 Cong. Rec. S13,594, S13,596-97 (1990) ("Statement of Managers"); Nondiscrimination Requirements for Qualified Plans, 56 Fed. Reg. 47,524,

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[4] As Congress recently observed, since 1978, "there has been a dramatic rise in the number of early retirement incentive programs used by employers." House Comm. on Education and Welfare, The Older Workers Benefit Protection Act, H.R. Rep. No. 664, 101st Cong., 2d Sess. 43 (1990). A 1990 survey of 145 randomly selected companies found that 44% of the surveyed companies had offered window plans during the preceding six years, with over two-thirds of such plans being offered during 1988, 1989, and the first two months of 1990. Towers, Perrin, Forster & Crosby, *TPF&C Survey of Window Plans* 1 (Apr. 1990) [hereinafter "TPF&C Survey"]. Current news reports also demonstrate the popularity of such programs among both public and private employers. *See, e.g.*, 19 Pens. Rep. (BNA) 787-88 (May 4, 1992) (Commonwealth of Massachusetts program offered to 7,000 state employees); 19 Pens. Rep. (BNA) 684 (Apr. 20, 1992) (program collectively bargained for by City of Pittsburgh and Fraternal Order of Police); 19 Pens. Rep. (BNA) 490 (Mar. 23, 1992) (Chevron program offered to 35,000 domestic employees); *id.* (Kansas Power & Light Co. and Kansas Gas and Electric Co. programs offered to union and non-union employees); 19 Pens. Rep. (BNA) 429 (Mar. 9, 1992) (Digital Equipment Corp. program offered to over 10 percent of domestic workforce).

47,531 (Sept. 19, 1991) (Preamble to Treas. Regs. § 1.401(a)(4)-1 to -13) (noting simplified testing method for retirement window benefits); Rev. Proc. 92-42, 1992-22 I.R.B. 41 (revoking ruling that inadvertently impaired window benefits for non-highly compensated employees).

Window plans are an important option for employers who decide to reduce their workforces or to curtail future accruals under their employee benefit plans for a variety of legitimate business reasons. Whatever the underlying reasons, however, a window plan is designed and adopted to encourage certain employees to terminate their employment voluntarily, in the hope of avoiding involuntary terminations or lay-offs. *See, e.g.*, H.R. Rep. No. 664 at 45; Statement of Managers, 136 Cong. Rec. at S13,596; 19 Pens. Rep. (BNA) 429, 490, 787-88 (1992). To this end, employees who separate from service under a window plan are offered enhanced employee benefits as incentives.[5]

Window plans are important not only to employers, but to employees as well. They permit employees to choose between voluntary early retirement and continued employment, rewarding those employees who choose early retirement with enhanced benefits they would not otherwise have received, and, in cases where the employer must reduce its workforce, preserving the employment of others who were threatened with termination or layoff.[6]

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[5] Some examples of such enhanced benefits include lump-sum severance payments and extended health benefits, *Martin v. General Motors Corp.*, 753 F. Supp. 1347, 1350 (E.D. Mich. 1991); unreduced (non-discounted) early retirement benefits, *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 433 (4th Cir. 1986); lump-sum retirement benefit payments, *Carpenter v. Trans World Airlines, Inc.*, 1991 U.S. Dist. LEXIS 1293 (N.D. Ill. 1991); increased retirement benefits, *Fischer v. Philadelphia Elec. Co.*, 1991 U.S. Dist. LEXIS 3076 (E.D. Pa. 1991); unreduced survivor benefits and life insurance benefits, *Saporito v. Combustion Eng'g, Inc.*, 843 F.2d 666, 669 (3d Cir. 1988), *vacated*, 489 U.S. 1049 (1989).

[6] One recent study found that 50% or more of the eligible employees had elected early retirement in more than 70% of the

As Congress recognized, in assuring that recent age discrimination amendments would not preclude voluntary, non-discriminatory window plans, "employees may welcome the opportunity to participate in such programs, and [the Committee] do[es] not intend to deprive employees of such opportunities or to deny employers the flexibility to offer such programs. . . ." Statement of Managers, 136 Cong. Rec. at S13,596.

Nonetheless, certain employees, like plaintiffs here, conclude by hindsight that none of their options is desirable even in light of the enhanced benefits. *E.g.*, *Stanton*, 792 F.2d 432; *Carpenter*, 1991 U.S. Dist. LEXIS 1293. In view of the prevalence of window plans, the Fifth Circuit's decision can be expected to increase dramatically the frequency of claims of constructive discharge by former employees who retire with their full vested benefits. Under the court of appeals' analysis, every former employee who retires because of some event that "relates to" an employee benefit plan (within the meaning of ERISA § 514) would be able to sue his former employer simply by identifying some other event or occurrence about which, he alleges, he should have been informed. Thus, such an employee would have standing to sue even though he had received full payment of his vested benefits or even enhanced benefits under the plan and even though his former employer complied fully with the applicable notice requirements of ERISA.[7]

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surveyed plans. TPF&C Survey, at 5. *See also* H.R. Rep. No. 664 at 44:

> [I]t is clear that a wide variety of early retirement incentive plans may help employers and workers meet problems arising from the impact of age on employment, or promote the employment or retention of older workers. . . .

[7] In connection with their age discrimination claims, plaintiffs alleged actionable concealment with respect to (1) Mobil's failure to notify its employees until October 1985 of the amendment providing for a discretionary waiver of the $450,000 eligibility threshold, and (2) Mobil's "awareness that applicable tax law precluded" in-

B. The Limitation of Standing to "Participants" Implements Congress' Purpose to Protect Employees' Benefits, Without Imposing Excessive Costs on Employers Offering Voluntary Early Retirement Programs.

The principal purpose of ERISA is "to promote the interests of employees in employee benefit plans" and to protect them against the loss of benefits promised to them under their employer's benefit plans. *Firestone*, 489 U.S. at 113 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), and citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)); *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1176 (11th Cir. 1988) (en banc); *see also* ERISA § 2, 29 U.S.C. § 1001 (Congressional Findings and Declaration of Policy). At the same time, Congress was concerned not to burden plans so heavily by ERISA's requirements that "employers respond . . . by decreasing benefits under existing plans or slowing the rate of formation of new plans. . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. The various provisions of ERISA accordingly reflect Congress' "careful balancing" of the need to promote and protect employees' benefits "against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (§ 502(a) enforcement scheme); *see also* H.R.

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creasing the lump sum threshold. Pet. App. 4a. The waiver amendment was adopted in October or November of 1984, in response to concerns expressed by the agent reviewing Mobil's request for a Service determination that the Retirement Plan continued to qualify for favorable tax treatment. *See* Pet. App. 4a. Under ERISA, the plan was not required to provide a summary of the amendment to participants and beneficiaries until 210 days after the close of the plan year in which the amendment was adopted.

As to Mobil's alleged awareness that increasing the lump sum threshold was contrary to applicable tax law, that assertion is refuted by the issuance of a favorable determination letter by the Service in November 1984. Pet. App. 4a.

Rep. No. 533, 93d Cong., 2d Sess. 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40 (projected cost of each provision was analyzed in relation to anticipated benefit).

The civil enforcement provisions of ERISA § 502, "one of the essential tools for accomplishing the stated purposes of ERISA," *Dedeaux*, 481 U.S. at 52, implement the balancing of benefit protection against the expense to plans and employers, in part, by conferring the right to sue only upon four specified classes of individuals: participants, beneficiaries, fiduciaries, and the Secretary of Labor.[8] The civil remedies provided by section 502 are exclusive. *Id.* at 54. They permit a former employee to bring suit only if he is a "participant" (or within another of the specified classes),[9] because only if a former employee is a participant—someone who "is or may become eligible to receive a benefit," ERISA § 3(7)—can he assert any claim for benefits, the core concern of ERISA. If a former employee is not a participant, then the balance of benefit protection against plan costs tilts against the individual; the cost to his former employer or plan of defending against his claims necessarily outweighs the concern for protection of his plan benefits, since he is entitled to none.[10] The Fifth Circuit's standing analysis in this case, however, undermines the Congressionally-mandated balance by permitting suits where a former employee's plan benefits have been fully protected, *i.e.*,

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[8] This Court has noted that "the common interest shared by all four classes is in the financial integrity of the plan." *Russell*, 473 U.S. at 142 n.9. A participant's interest in the fiscal soundness of the plan, of course, follows directly from his interest in receiving his contractually defined benefits.

[9] Plaintiffs do not claim standing for purposes of ERISA on any basis other than as participants in Mobil's Retirement Plan.

[10] A claim alleging the loss of unearned benefits to be accrued in the future is not a claim for ERISA-protected benefits. *See infra* pp. 16-17.

they have been fully paid to that former employee, and his claim is for his job.

Notwithstanding the Fifth Circuit's apparent view to the contrary, ERISA § 510 is equally consistent with Congress' purpose to protect employee plan benefits without imposing undue costs on plans and employers. Not only does section 510 provide explicitly that it shall be enforced under section 502, but, like section 502, its provisions are limited to the protection of plan benefits. Section 510 does not confer on former employees a substantive right to be employed simply because the employer has a benefit plan, the employee participated in a benefit plan, or the employee left his job under circumstances that related to a benefit plan. Rather, section 510 only establishes an employee's more limited right not to be discharged to prevent him from attaining plan benefits or for exercising a right related to his plan benefits. Where, as here, a former employee's plan benefits have been fully protected and paid to him in a lump sum, and the calculation and amount of that sum is not disputed, the concerns addressed by section 510 are not raised.

In the face of Congress' clear limitation of ERISA standing to "participants," the potential costs to plans and employers of the court of appeals' ruling should not be underestimated. Many of the thousands of employees who retire each year under window plans and receive full payment of their contractually defined benefits may nonetheless have second thoughts about their decision to retire. If they are permitted to go forward with ERISA litigation by alleging merely that they "would be" participants "but for" some event that came to their attention subsequent to their retirement (Pet. App. 26a), ERISA's purpose to protect employee benefits will not be served. The costs of litigation alone will unquestionably reduce the amounts available to provide benefits for persons who are participants.[11] Moreover, to the extent that window plan

[11] *See* H.R. Rep. No. 779, 93d Cong., 2d Sess. 14 (1974) (pension plan cost "is an important factor in determining whether any

retirees potentially have standing to sue under the Fifth Circuit's analysis, their well-advised former employers probably should treat them as "participants" for other purposes of ERISA as well, forwarding plan documents and responding to their requests for plan information. Ultimately, the prospect of increased litigation and the imposition of substantial additional costs will operate to discourage employers from offering window plans at all.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CONSTRUCTION OF ERISA'S DEFINITION OF "PARTICIPANT"

A. The Definition of "Participant" as Construed in *Firestone* Is Applicable to All Causes of Action under ERISA Title I.

The Fifth Circuit predicated its standing analysis in this case on the assertion that *Firestone* does not "reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge." Pet. App. 22a. Thus, the court effectively held that a different definition of "participant" should apply in discharge cases than in other ERISA matters. This ruling by the court of appeals is directly at odds with both ERISA itself and *Firestone*.

First, ERISA contains only one definition of "participant"—that found in ERISA § 3(7). That definition, like all other definitions in ERISA § 3, is applicable by its terms "[f]or purposes of this title." The referenced title is Title I of ERISA, §§ 2-608, 29 U.S.C. §§ 1001-1168, which contains all of the enforcement provisions that may even arguably be relied upon by plaintiffs in this case, including sections 502 and 510.[12]

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particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted . . .").

[12] ERISA Title IV, 29 U.S.C. §§ 1301-1461, relating to plan termination insurance and the Pension Benefit Guaranty Corporation,

The provisions of ERISA § 502 enumerate the various types of claims that may be asserted, including claims to enforce ERISA's disclosure provisions, *id.* at (a)(1)(A), (a)(4); claims to recover plan benefits or to enforce or clarify the terms of a plan relating to benefits, *id.* at (a)(1)(B); claims to remedy breaches of fiduciary duty, *id.* at (a)(2); and claims:

> (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan. . . .

Id. at § 502(a)(3).

No provision of section 502, however, permits claims to be brought by anyone other than a participant, a beneficiary, a fiduciary, or the Secretary of Labor. And ERISA § 510 specifically provides that ERISA § 502 is applicable to its enforcement.

Second, in *Firestone* this Court construed ERISA's definition of "participant," and reached a result contrary to that reached by the Fifth Circuit in this case. In so doing, this Court addressed every aspect of the definition that could conceivably confer standing on plaintiffs in this case. Plaintiffs are not and never were members of an "employee organization" within the meaning of ERISA, *see* ERISA § 3(4), 29 U.S.C. § 1002(4), and do not claim that they are participants because they have eligible beneficiaries under Mobil's Retirement Plan. Thus, the only part of the definition that might afford them participant status is the portion specifically at issue in *Firestone*, *e.g.*, "any employee or former employee . . . who is or may become eligible to receive a benefit." ERISA § 3(7), 29 U.S.C. § 1002(7).

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also includes provisions for enforcement through civil actions by, *inter alia*, "a plan partipant." 29 U.S.C. § 1451(a)(1). Plaintiffs' claims patently do not relate to Title IV.

The fact that the controversy in *Firestone* concerned disclosure obligations rather than an alleged constructive discharge does not support the Fifth Circuit's rejection of *Firestone* here. It is clear from this Court's opinion that *Firestone*'s construction of "participant" applies to every use of that term in Title I of ERISA, in accordance with the "normal rule of statutory construction," which "assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932))). *See also Patterson v. Shumate*, No. 91-913, slip op. at 5 n.2 (U.S. June 15, 1992) (opinion of the Court); *id.* at 1 (Scalia, J., concurring).

Exactly like this case, the *Firestone* case involved the Third Circuit's attempt to incorporate a special definition of the term "participant" into certain substantive provisions of Title I. In particular, the Third Circuit had ascribed a special, expansive meaning to the term "participant" for purposes of ERISA's disclosure provisions: For purposes of a participant's right to request copies of certain plan documents under ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), said that court, "participant" includes someone who *claims* to be entitled to benefits. Moreover, at least for purposes of a participant's ability to enforce his right to disclosure, the Third Circuit concluded that section 502(a)(1) of ERISA authorizes suit by anyone who "claims to be" a participant. *See Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 152, 153 (3d Cir. 1987), *modified*, 489 U.S. 101 (1989).

This Court, however, squarely rejected a provision-by-provision approach to defining "participant." In this Court's view, the Third Circuit's analysis was incorrect because "it strays far from the statutory language" of ERISA § 3(7): "To say that a 'participant' is any per-

son who claims to be one begs the question of who is a 'participant' and renders the [statutory] definition . . . superfluous." *Firestone*, 489 U.S. at 117. The Fifth Circuit's analysis in this case, which seeks to modify and expand the statutory definition of "participant" in cases alleging constructive discharge under section 510, suffers from the same fundamental defect. If accepted, the Fifth Circuit's analysis would lead to the absurd result that the term "participant" in section 502 means one thing if a claimant sues to remedy an alleged violation of section 510 and something else if his suit involves a different ERISA claim.

B. The Construction of "Participant" Adopted by the Fifth Circuit Was Expressly Rejected in *Firestone*.

The Fifth Circuit adopted a "but for" test to determine whether a claimant in a discharge case under ERISA § 510 has standing to sue.

> [Plaintiffs'] allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that *but for* Mobil's nondisclosure they *would be* covered employees with standing to challenge the plan amendment.

Pet. App. 26a (emphasis supplied).

Significantly, the court of appeals did not decide that former employees in plaintiffs' position are participants within the meaning of ERISA § 3(7)—a conclusion foreclosed by the statutory language and *Firestone*, as that court recognized (Pet. App. 21a-23a)—but rather that their lawsuit could proceed because they are claiming that they should be participants.

This type of "but for" analysis is no different than the analysis employed by the Third Circuit and rejected by this Court in *Firestone*, because it would authorize suit by a group of persons who are not, but claim to be, participants. Unlike the Fifth Circuit, other federal

courts have understood that *Firestone* forecloses standing where a former employee is not, but "claims to be" or "would be," a participant in the benefit plan at issue. *E.g.*, *Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 951-52 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 678 (1991); *Winchester v. Pension Comm. of Michael Reese Health Plan, Inc. Pension Plan*, 942 F.2d 1190, 1193 (7th Cir. 1991); *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990); *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1205-06 (W.D. Pa. 1992); *Jones v. AT&T Co.*, 1992 U.S. Dist. LEXIS 4139 (E.D. Pa. 1992).

C. This Court's Decision in *Ingersoll-Rand Co. v. McClendon* Is Consistent with *Firestone*.

Notwithstanding the clear import of *Firestone* and the fact that ERISA contains a single definition of "participant," the Fifth Circuit found support for its expansive reading of "participant" for purposes of discharge cases in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). *See* Pet. App. 22a. *Ingersoll-Rand* held that a state law discharge claim was preempted explicitly by ERISA § 514, 29 U.S.C. § 1144, and implicitly by section 510, where the employer's alleged motive was to cease contributions to, and not pay benefits under, its pension plan on behalf of the employee. *Ingersoll-Rand*, however, simply is not apposite to this case.

First, *Ingersoll-Rand* is a preemption case, not a standing case. The opinion neither raises nor discusses any issue as to the discharged employee's standing or status as an ERISA "participant," and *Firestone* is not mentioned. Nonetheless, the Fifth Circuit inferred that *Ingersoll-Rand* must modify or limit the scope of *Firestone*, on the ground that the preemption ruling implied that the discharged employee would have standing to seek an ERISA remedy. The court of appeals concluded that "it would seem [] logical to say that but for the employer's

conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits. . . ." Pet. App. 22a-23a (emphasis in the original).

This reading incorporates precisely the "but for" or "claims to be" principle of participant standing that *Firestone* rejected only the previous year. Moreover, the standing analysis that the Fifth Circuit inferred from *Ingersoll-Rand* would have been unnecessary to this Court's decision. The essence of McClendon's claim was that he was discharged so as to prevent his accrued benefit under his employer's pension plan from increasing or vesting. Taking the well-pleaded allegations of his complaint as true, as a court must in deciding the threshold question of standing, *e.g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), he was a former employee "with a 'colorable claim' to vested benefits" under the plan, *Firestone*, 489 U.S. at 117, because, under ERISA § 510, he could not be discharged to prevent the attainment of a vested right to his accrued benefit. Also, he was a former employee who "may become eligible" for benefits, because he could assert a "colorable claim that (1) he will prevail in a suit for benefits. . . ." *Id.* Plaintiffs here, by contrast, have not and cannot assert any claim for benefits under Mobil's Retirement Plan. They were paid the full amount of their vested benefits under the plan in a lump sum upon their retirement, and they have never disputed the calculation or amount of that payment.

Finally, even if McClendon were not a participant under *Firestone*, the fact that his state law claim is preempted by ERISA would not require that he have an ERISA remedy. This Court and other courts repeatedly have recognized that ERISA may preempt a state law cause of action even where a similar federal remedy is unavailable. *E.g.*, *Dedeaux*, 481 U.S. at 53-54; *Lee v. E.I. Du Pont de Nemours and Co.*, 894 F.2d 755, 757

(5th Cir. 1990); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 579 (1990). In such cases, the effect of preemption may be to deny plaintiffs any remedy for alleged wrongdoing that relates to an employee benefit plan. This result may appear inequitable, but it is the consequence of policy choices that were and are appropriately made by Congress. Congress could, for example, have created a special definition of participant for the purpose of the enforcement provisions of ERISA, or expanded the categories of persons entitled to sue, but it did not. It is not the province of a court to rewrite or distort a statutory provision when the court perceives that the statutory results may be unfair.[13] *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376-77 (1990); *see also Russell*, 473 U.S. at 147 (court should not tamper with ERISA statutory scheme).

D. Plaintiffs Are Not Participants Under ERISA and *Firestone*.

As former employees, plaintiffs have standing to pursue an ERISA claim against Mobil only if they have either a colorable claim to vested benefits from the Retirement Plan or a reasonable expectation of returning to covered employment. *Firestone*, 489 U.S. at 117. Plaintiffs clearly do not satisfy either part of this test.

The Fifth Circuit recognized that plaintiffs cannot assert any claim to vested benefits, since they received full payment of their vested benefits under the plan at the time of their retirement. Pet. App. 21a. It is well established that, under these circumstances, plaintiffs' claim is necessarily one for future, unearned benefits rather than for vested benefits. *E.g.*, *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir. 1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d

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[13] In this case, the Fifth Circuit properly held that plaintiffs' state law claims were preempted, because "the basis of the claims themselves is the operation of the pension plan." Pet. App. 19a.

345, 349-50 (5th Cir. 1989); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986). *See also* 29 C.F.R. § 2510.3-3(d)(2)(ii)(B) (individual who has received lump-sum distribution from pension plan is not "participant"). Therefore, the part of the *Firestone* test that confers standing on a discharged employee like McClendon, *see supra* p. 15, does not apply to plaintiffs here.

Plaintiffs also have not alleged facts that would demonstrate a reasonable expectation of returning to covered employment. Plaintiffs never sought reemployment; indeed, the only evidence of any desire to return is their prayer for reinstatement under their rejected age discrimination claims. Pet. App. 22a.[14] Neither a bare desire to return to work nor a prayer for reinstatement suffices to establish a "reasonable expectation" of returning to employment, *Winchester*, 942 F.2d at 1193; *Shawley*, 748 F. Supp. at 1205; *Carpenter*, 1991 U.S. Dist. LEXIS 1293, and the Fifth Circuit properly declined to find standing here on that basis. *See* Pet. App. 23a. Instead, as the courts that have considered this part of *Firestone* have agreed, a claimant's reasonable expectation must be established by facts independent of the pleadings, through a contractual or statutory right to be recalled to work. *Zydel v. Dresser Indus., Inc.*, 764 F. Supp. 277 (W.D.N.Y. 1991); *Baeten v. Van Ess*, 474 F. Supp. 1324, 1330-31 (E.D. Wis. 1979); *cf. Shawley*, 784 F. Supp. at 1205 (no reasonable expectation after contractual right to recall expired). Plaintiffs cannot make that showing here.

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[14] The Fifth Circuit affirmed the ruling of the district court that plaintiffs' claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, were barred by the applicable statute of limitations. Pet. App. 13a.

CONCLUSION

If permitted to stand, the Fifth Circuit's decision will have far-reaching, adverse consequences for voluntary early retirement programs, without serving any benefit protection purpose. Accordingly, the petition for writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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